

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1273

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

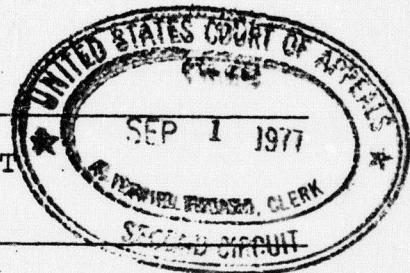
CURTIS ROOSEVELT DAVIS,

Defendant-Appellant.

Appeal from the United States District Court

For the Eastern District of New York

BRIEF FOR DEFENDANT-APPELLANT



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Defendant-Appellant

BRIEF FOR APPELLANT
CURTIS ROOSEVELT DAVIS

Preliminary Statement

The defendant, a Postal Service employee, was indicted under two counts for the crimes of embezzlement of checks which came into his possession, intended to be conveyed by mail, in violation of 18 U.S.C. §1709 and

unlawful possession of stolen checks in violation of 18 U.S.C. §1708. The defendant was found guilty on both counts after trial before the Honorable Thomas C. Platt, United States District Judge, and a jury. On June 10, 1977, the defendant was sentenced under The Youth Correction Act. He was committed to the custody of the Attorney General or his authorized representative pursuant to 18 U.S. 5010b until discharged by the U.S. Parole Commission as provided in 18 U.S. C. Section 5017. The defendant appeals from the aforesaid judgment of conviction.

STATEMENT OF THE CASE

The defendant, Curtis Davis, while working as a temporary mail carrier, was held up by two men who absconded with the mail which Davis was in the process of delivering. Davis reported the theft to the postal authorities. (T 268).* Thereafter, Davis was interviewed by postal inspectors who returned with him to the area of the crime (T 270). Davis was then relieved of his regular duties as a mail carrier and was instructed to go into the area in which he had been robbed "as an ordinary civilian, and possibly gather any

* All references marked T are to the transcript of the trial.

information" he could obtain concerning the individuals responsible (T 55). Davis remained on the government payroll while acting in his undercover capacity. (T 56).

Davis testified that in assigning him undercover duties, the postal inspectors had instructed him to find out information concerning the theft of mail from him "and anything else that pertains to mail theft." (T 272). Davis was given a card by Postal Inspector O'Brien, with the number to call in the event he obtained any information. (T 239, 272). He was dropped off in the Bedford Stuyvesant area by the inspectors (T 274) and introduced to an informer whom they had in the area (T 275). Davis stated that he initially reported by telephone to the postal agents every hour (T 276), and thereafter, continued to report to them in the office about "things that happened in the street." (T 280).

The postal inspectors confirmed that Davis had been commissioned to look for the persons who robbed him and, if possible, to locate the stolen checks (T 57), but denied that he had been given authority to investigate any other crimes (T 58).

Davis testified that while at the apartment of a female friend, a telephone call was received by the friend's brother. The brother indicated that the caller wished to speak to Davis (T 291) and Davis thereupon spoke to the party

on the other end, whose voice he did not recognize. (T 292). The party on the phone informed Davis that he was interested in checks "out of the Post Office" (T 293), and Davis arranged a meeting for the following day in a McDonald's restaurant (T 294).

The government witnesses testified that the aforesaid phone call had been initiated by the government. A "confidential source" introduced Davis by phone to postal inspector Citera (one of the inspectors with whom Davis had been working), as "Frankie" (T 70). After arranging a meeting with Davis, allegedly in order to purchase checks from him, Citera arranged for another postal inspector, unknown to Davis, to keep the appointment (T 78).

At the agreed upon time, Davis went to McDonald's with a friend, West. Davis testified that he asked West to accompany him in order to notify the postal inspectors if the scheduled meeting in fact, took place (T 302). Davis stated that he gave West the inspector's card previously given Davis and instructed West, "when I meet the person and I leave McDonald's: You get up and call the inspectors". (T 302) West confirmed that Davis had given West a card, with instructions that if Davis "would have gotten into any trouble or anything like that, I was supposed to call up the telephone number on the card" (T 474). West stated that he never called the number,

having been apprehended by postal inspectors as he left McDonald's (T 475).

Davis met Postal Inspector Elliott (posing as "Frankie") at McDonald's, as prearranged, and parked his car near the restaurant (T 306). Davis stated that in the restaurant, Elliott showed him a large amount of money (T 309) and they proceeded to Davis' car (T 312). Davis handed Elliott twenty four checks previously removed by West from mail which was to have been delivered by Davis. Elliott, who was wired for sound,* thereupon gave a prearranged verbal signal (T 148) and the arrest of Davis was made.

Davis testified that while sitting with Elliott in the car, he "saw two males running to the car with some guns." (T 317). Davis thereupon left the car and ran (T 320). He testified that he did not recognize the individuals as they approached with guns (T 320), but stopped when he ultimately recognized their voices (T 321).

Inspector O'Brien testified that at Elliott's signal, but before any money had changed hands (T 217), three inspectors approached the car in which Elliott and Davis were seated (T 204). O'Brien did not recall that any of the inspectors had drawn their guns before Davis left the car (T 233) but stated that they did so afterwards. (T 204, 233, 234). O'Brien confirmed that Davis stopped running "on his own volition" after he was "yelled at" by the inspectors (T 236).

* Certain tapes made by Elliott were played for the jury.

After Davis was apprehended, his car was searched and two checks in an unopened envelope on the floor of the car were removed (T 207).

Davis was arrested and subsequently indicted for embezzling the twenty-four checks given to Elliott and possession of the other two. Curtis testified, however, that at no time did he intend "to actually steal the checks." or "take the money." (T 324). When asked why he had entered into the transaction with Elliott, Curtis stated, "I was helping them." Curtis contended that he had been authorized to enter into such a transaction by Inspector Citera who had told him that "if anybody offers, wants to buy checks, give them something, give them something worthwhile and make them an offer." (T 53). Thus, Curtis contended that he had not arranged the sale of checks in furtherance of any personal motive, but rather, in order to provide government officials with evidence he believed they wanted. (T 324).

The court, in its charge, informed the jury of Davis' claim that "he was acting for and at the behest of the Postal Inspectors" in setting up "a buy of checks taken from the mails." (T 573). The court further charged that the Government claimed that the defendant was not requested or authorized "to act in an undercover capacity or to set up a buy with checks taken from the mail. These then are the issues for you to determine in this particular case." (T 574).

The court also charged the jury that the law presumes a defendant to be innocent of crime. Thus, a defendant although accused begins the trial with a clean slate, with no evidence against him (T 565). The defendant's counsel asked the court "to charge the jury that this defendant is presumed innocent until such time as each and every one of the jurors has found him guilty beyond a reasonable doubt, after revealing (sic) the evidence." The court refused to give the requested charge. (T 590).

QUESTIONS PRESENTED

1. Where the defendant did not deny the actual conduct charged, but contended that he had acted in the Government's interest, did the court err in instructing the jury, in effect, that the issue to be determined was whether the defendant had authority to so act, rather than whether he believed that he did?
2. Did the court below err in failing to include criminal intent as one of the essential of the crime charged in count II of the indictment?
3. Did the court below err in failing to charge that the presumption of defendant's innocence continued until a judgment of conviction was entered?

POINT I

THE COURT BELOW ERRED IN CHARGING
THE JURY WITH RESPECT TO THE ISSUE
OF THE DEFENDANT'S INTENT

The court below, in a confused and disorganized charge, not only failed to fully and adequately instruct the jury with respect to the issue of criminal intent, but in addition, actually misled the jury by mistating the facts and erroneously interpreting applicable law. Although this case is an unusual one, the court below read to the jury what appeared to be isolated portions of a standard charge, without explaining the relevance of such instructions to the particular circumstances of the case, or indeed, integrating the two in any coherent way. Accordingly, the defendant submits, the jury was erroneously charged with respect to his defense and had no proper notion of the true issue to be determined.

- A. The Court Improperly Framed The Issue Of Intent. The Issue Was Not, As The Court Indicated, Whether Defendant Was Authorized To Act For The Government, But Rather, Whether He Believed That He Was.

The court below erroneously charged the jury with respect to the existence of a mens rea. Noting the defendant's contention that he lacked "the requisite intention to commit

the alleged offence", the court stated: "The Government claimed that Postal Inspectors did not request or authorize this defendant to act in an undercover capacity or to set up a buy with checks taken from the mail. These then are the issues for you to determine in this particular case." (T 574). Thus, despite clear evidence to the contrary, the court instructed the jury that the Government contended that the defendant had not been requested to act in an undercover capacity. In addition, the court further erred in instructing the jury, in effect, that the issue to be determined by it was whether the Government's claim that defendant had not been authorized to so act or "to set up a buy" was in fact, true. The real issue to be determined, however, was not whether, in setting up "a buy", the defendant had actually been authorized to act on the Government's behalf, but rather, whether, as defendant testified, he believed that he had. As the defendant will demonstrate below, the record reveals ample justification for the defendant's stated belief.

1. The Record Lends Support To The Defendant's Contention That He Was Acting In The Government's Interest

The circumstances of this case are, without question, unique. The defendant, a temporary mail carrier, was robbed

of mail while in the course of his delivery (T 268). He reported the theft and was interviewed by two postal inspectors, O'Brien and Citera (T 269). Davis testified that he was told by the inspectors "that the following week, [he] wouldn't be working in his station, that [he] would be working with them." (T 272). He further stated: "They told me that I should work around, be loose, find out information, you know, concerning to that crime and anything else that pertains to mail theft, to call them and give them a call over at the office." (T 272). The defendant testified that he was given a card with a number to be called and that he was informed that he would be paid for undertaking this work. (T 273).

According to the defendant's testimony, he was dropped off at the scene of the robbery by the inspectors. On New Year's Day, he met the inspectors and was driven by them to Bedford Stuyvesant (T 274). Davis was introduced to one of the inspectors' informers. (T 275). The defendant called the inspectors "every hour" (T 276) for the first week (T 277). The defendant looked at mug shots and picked out three pictures. (T 278). The addresses of those persons were procured and the defendant was taken to the area in which they lived in an effort to apprehend them.

Davis testified that he spoke to Citera and O'Brien "all week." (T'280). He was then asked:

Q. Did there come a time when they told you what to do for them, if anything?

The defendant answered:

"Well, there come a time when we return to the office and we was discussing like certain things, like off-the-record or things that happened in the street, just between O'Brien, Citera and myself in the office, sometimes behind closed doors, but sometimes not.

You know, and there come a time when they would discuss about, you know, other cases or certain things that they would like to find out, you know, how it happens, you know.

Q. Find out what?

A. You know, how certain things have been in the neighborhood, and being that I was raised up in the neighborhood, they feel that I had, I know my way around the neighborhood.

I should, you know, to know what is going on in the streets.

Q. Did they tell you anything about checks?

A. No, they didn't tell me about checks. The things that they mentioned that if anybody approached me, you know, make him an offer. Make him, you know, give him

something to come back for. Like, you know, something to that effect.

Q. In other words, if somebody makes an offer pertaining to something about the Post Office?

A. Right.

Q. To keep him on the line?

A. Right, keep them.

Q. And inform them?

A. Right."

On cross examination of the defendant, the prosecutor did not quarrel with the defendant's contention that he had been authorized to be on the look-out for criminal conduct, but only questioned the time at which Davis was to notify the government:

"Q. Had you been told prior to February 24th, that if any criminal conduct or possible criminal conduct came to your attention, that you were to call the Postal Inspectors for setting up any deals?

A. Yes, I was.

Q. So you violated those instructions; is that correct?

A. I was instructed to make an offer and call when I can, there at that time or any time that it was happening.

Q. Isn't it a fact, Mr. Davis, that you were told before you made any final arrangements, not before you

show up, but before you make any final arrangements that you were to consult the Postal Service Inspectors?

A. Yes, I was but --

Q. And you didn't do that, did you?

A. I didn't have time, it was nighttime, it was nighttime; there was nobody to call." (T 44, 45).

The defendant testified that during the relevant period, he had informed postal authorities about persons on his route whom he deemed suspicious:

"Q. Was there any discussion with these agents about someone that did approach you about some insurance or something?

A. Well, I was going on the same street, the way I got robbed, another road right next to it and two-- well, you know, male white caucasian men approached me, talking about some insurance and they were following me about half of the route, and so, finally, I asked them why they was approaching me and they told me that this was insurance agents. And I told O'Brien and Citera that two people was following me on the route and they told me the next time to get the license plates of the car, which I made out a report in the station, and they did come back by my route again, and I got the license plates of the car. It turned out to be insurance people."

Thus, the record indicates, the defendant continued to conduct himself as if he believed himself authorized to assist the government.

Davis contended that in setting up the "buy" by Elliott, the defendant believed that he was assisting the Government. Indeed, after his arrest, the defendant told Citera and O'Brien: "I was doing this for [you]." (T 324).

The defendant, himself, did not furnish the only evidence with respect to his undercover activities. The Government's witnesses, contrary to the court's charge, confirmed that Davis had been requested and authorized to act in an undercover capacity. Inspector Citera testified that Davis had been taken off his "regular mail delivery function" to be "in the street." (T 42). His "main purpose" was to locate the persons who robbed him. However, "he was also advised if anyone had approached him with stolen checks, or perhaps a sale, he was advised to contact our office." (T 42).

Citera stated that for the week following the robbery, Citera met Davis "every day." They would have a "prearranged spot" to meet. (T 54). For his investigative activities, Citera stated, Davis was on the government payroll. (T 56).

Citera stated that although Davis went back to his regular duties as a carrier, he was told by Citera "to keep his eyes open for the individual that he may have thought responsible" for his robbery (T 65) and also for individuals "with any kind of stolen checks." (T 66). Citera admitted that Davis had called the inspectors' office after his return to regular duties (T 66) and indeed, contended that he was so familiar with Davis' voice that he recognized it over the telephone almost two months later (T 69).

Citera also confirmed that Inspector O'Brien gave Davis his card with a number which the defendant was to call. Citera also stated that he had Davis' home number and that he had called him there:

"Q. Now, during this period of time that he was cooperating and trying to help the Government, your agency, in tracking down crime, did you have occasion to call him at his home?

A. Yes, I did.

Q. When he helped your service on occasions, didn't you sit him down and talk about other things besides crime?

A. Yes, sir."

The testimony of Inspector Citera indicated that Davis had spent more than a little time in the inspector's office. Thus, he contended that at the time of the defendant's arrest, he knew one of the officers who had been observing him:

"He knew Inspector Barney. I believe that he was familiar with most everyone in the office, because he had been up there on a few occasions." (T 117)

Citera also confirmed Davis' statement that he had informed the inspectors of two persons he deemed suspicious:

"He said that they looked like shady people and there was something wrong about it, and he will keep us advised, if anything happens." (T 125)

At no point in his testimony did Inspector Citera indicate that he had discouraged Davis in his efforts to help the government or inform him that he was not authorized to do so.

Postal Inspector Elliott confirmed Davis' contention that he had spoken to West just prior to departing from McDonald's. Although Elliott testified that he did not overhear the substance of the conversation, he did give evidence that it took place.

Postal Inspector O'Brien testified that he had informed the defendant that "if anyone ever approached

him concerning matters that he thought were suspicious, to tentatively tell them he may meet them later on and give us a call right away." (T 239). He further testified:

"Q. So you were interested not only in the fact that he was robbed, but you were interested in other illegal activities, weren't you?

A. Any activity that someone would approach him as a carrier of the mail, yes." (T 240. Emphasis added).

Thus, the evidence adduced at the trial clearly establishes that the defendant had substantial reason to believe that he had the Government's authorization, or at the least, consent, to activities on his part which might be of assistance in the investigation of certain crimes. The evidence reveals that Davis was expressly authorized to investigate his own robbery and inferentially, if not expressly, to be of assistance in other matters, particularly those dealing with the mails. The record demonstrates that Davis' contact with postal authorities did not end after his return to his regular postal duties. Indeed, communication between Davis and such authorities was a continuing affair.

Although the Government agents contested the extent of the authority given Davis by them, they contended in essence, that they did not deputize Davis because they lacked the legal right to do so. However, they did not contend that Davis, himself, did not believe that by their conduct, they had done so, and that, in his activities other than the final

transaction he was acting in the Government's behalf.

Accordingly, the true issue before the jury was not, as the court below suggested, whether postal authorities had authorized the defendant to act on their behalf, but rather, whether the defendant believed that they had. Thus, the question of the defendant's intent was a crucial issue with respect to which the jury was incompletely and erroneously charged.

It has long been held that criminal intent is a sine qua non of criminal responsibility. "The contention that an injury can amount to a crime only when inflicted by intention is no provincial and transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."* Indeed, the watchfulness of the jurist should insist "upon the examination of the mind of each individual offender."** In Morisette v. United States***, the United States Supreme Court held that the crime of embezzlement of Government property requires a criminal intent. The question of intent

* Morisette v. United States, 342 U.S. 246, 250 (1952).

** Ibid, p. 255, fn. 14, citing Radin, Intent, Criminal, 8 Encyc. Soc. Sci.

*** Ibid.

"must always be submitted to the jury and a conviction cannot be had in the absence of an intent which is criminal." "Whether that intent existed, the jury must determine, not only from the act of taking, but from that together with defendant's testimony and all of the surrounding circumstances."*

In the instant case, the court inadequately and erroneously instructed the jury with respect to the issue of the defendant's intent. Although the court interspersed unrelated bits and pieces of instruction dealing with that issue throughout its charge, the jury was in no way properly and coherently apprised of the true question of intent to be determined. Since "juries are not bound to what seems inescapable logic to judges", defendant contends, that if properly charged, the jury in his case might have acquitted him.

B. The Court Erroneously Charged The Jury
That The Government Claimed That Postal
Inspectors Did Not Request or Authorize
The Defendant To Act In An Undercover
Capacity

Without defining the word "undercover", the court below instructed the jury that the government contended that

*Ibid, p. 270

the defendant had not been authorized to act in that capacity. The court, thus, led the jury to believe that the government denied that the defendant had been authorized to undertake investigative work. As the record reveals, however, government witnesses confirmed that the defendant had been assigned such work and controversy existed only with respect to the range of activities to which such assignment extended. Thus, the Government did not deny that the defendant had been authorized and paid to assist it, in civilian clothes, in solving crime, but rather sought to limit the conduct which such authorization was meant to encompass. The court's charge, therefore, served to undercut the defendant's defense and since it was contrary to the evidence, constituted reversible error.

C. The Court Below Erred In Omitting
 To Charge The Jury That Criminal
 Intent Was An Essential Element Of
 A Violation Of Unlawful Possession
 Of Stolen Checks

The court below charged the jury that four essential elements were required to be proved beyond a reasonable doubt in order to establish the offense charged in count two of the indictment:

"Four essential elements are required to be proved beyond a reasonable doubt in order to establish the offense charged in Count two of the indictment.

First, that the letter and the contents, or the the letters and their contents referred to in the indictment were deposited in and sent through the mail. Second, that the letters and their contents were stolen, taken, embezzled or abstracted from the mails.

Third, that the defendant later had the letters or the contents in his possession, and fourth, that at the time of his possession, the defendant knew the letters or the contents were stolen." (T 572).

Thus, the court informed the jury that mere possession of stolen letters and their contents sent through the mail, with knowledge of the theft, was sufficient to establish the defendant's guilt of the crime charged in the second count of the indictment. The court failed to charge the jury, that, as shown above, criminal intent was also an essential element of that crime.

Although the court thereafter discussed the word "knowingly", and the purpose of "adding" the word, the court did not instruct the jury as to where the word was added or how and to what it applied. Clearly, the court did not include the word in its list of essential elements of the crime charged

in count II. The court's charge, defendant submits, clearly constituted reversible error.

POINT II

THE COURT BELOW ERRED IN CHARGING
THE JURY WITH RESPECT TO THE
DEFENDANT'S PRESUMPTION OF
INNOCENCE

The court below charged the jury: "Now the law presumes a defendant to be innocent of crime. Thus, a defendant, although accused begins the trial with a clean slate, with no evidence against him." (T 565). The charge of the court instructs the jury that the presumption of innocence is equated with a "clean slate" and "no evidence" and ends when valid evidence is introduced by the prosecution. In fact, however, the presumption of innocence follows an accused throughout the trial until overcome by a guilty verdict. Moreover, the "overriding presumption of innocence with which the law endows the accused ... extends to every element of the crime."* The court's scanty and misleading charge failed properly to instruct the jury with respect to this basic and important right of the defendant.

The defendant's counsel requested the court to amplify its charge with respect to the presumption of innocence:

* Morisette v. United States, supra, p. 275.

"Now your Honor, I ask the Court to charge the jury that this defendant is presumed innocent until such time as each and every one of the jurors has found him guilty beyond a reasonable doubt, after revealing (sic) the evidence." (T 590).

The court refused the request, since the charge given by it was "a standard charge" given in every case. Defendant submits that the court's inadequate and misleading charge and its failure to grant the defendant's request constituted reversible error.

CONCLUSION

Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury. The court below erroneously failed to charge the jury that the defendant's intent was an essential element of the crimes with which he was charged. The court further failed to charge the jury that the defendant's state of mind was the principal issue to be considered by them. Since the defendant did not deny the actions charged, but rather contended that they had been undertaken in the Government's interest, the court below erred in instructing the jury, in effect, that the issue to be deter-

mined was the extent of the defendant's authority to so act, rather than what he believed such authority to be.

The court also erred in failing to include the charge requested with respect to the presumption of innocence. The court's charge equated that presumption with a "clean slate" and failed to instruct that it was not extinguished by the presentation of valid and credible evidence against the defendant.

The court's errors were substantial and prejudicial to the defendant. Accordingly, the judgment of the court below should be reversed.

Respectfully submitted,

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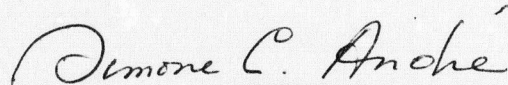
STATE OF NEW YORK)
COUNTY OF NEW YORK)

AFFIDAVIT OF SERVICE BY MAIL

SIMONE C. ANDRE, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 333 East 53rd Street, New York, New York 10022.

That on the 1ST day of September, 1977 deponent served two true copies of the within BRIEF for Defendant-Appellant upon the attorney listed below in this action at the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

DAVID G. TRAGER, Esq.
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York


Simone C. Andre

Sworn to before me
this 1st of September, 1977


Notary Public

JOAN T. HARNES
Notary Public, State of New York
No. 31-6774449
Qualified in New York County
Commission Expires March 30, 1978

